

STATE OF MAINE  
PUBLIC UTILITIES COMMISSION

Docket No. 98-824

November 3, 1998

PUBLIC UTILITIES COMMISSION  
Sale of Capacity and Energy of  
Undivested Generation Assets;  
Extension of Divestiture Deadline  
(Chapter 307)

NOTICE OF RULEMAKING

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WELCH, Chairman; NUGENT and DIAMOND, Commissioners

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## I. INTRODUCTION

This proposed rule implements 35-A M.R.S.A. § 3204(4)(sale of capacity and energy of generation assets and generation-related business activities that are not divested by investor-owned electric utilities) and 35-A M.R.S.A. § 3204(3)(deadline for divestiture for certain assets).

## II. STATUTORY REQUIREMENT AND OVERVIEW OF RULE

35-A M.R.S.A. § 3204 (Divestiture of Generation) is part of the Act to Restructure the State's Electric Industry ("Restructuring Act" or "Act"). P.L. 1997, ch. 316 (codified at 35-A M.R.S.A. §§ 3201-3217). Section 3204 addresses disposition of generation assets by **investor-owned electric utilities** and requires the Commission to conduct two rulemakings. **Neither the statute nor this proposed rule apply to consumer-owned electric utilities, as defined in 35-A M.R.S.A. §§ 3201(6) and 3501(1).**

We describe first the general structure of section 3204. Subsection 1 requires utilities to "divest" themselves of "all" generation assets on or before March 1, 2000, except for certain listed assets and activities. Subsections 1 and 4 allow investor-owned utilities to retain ownership and control beyond March 1, 2000 of certain assets and activities that are listed as exceptions in subsection 1; subsection 4 requires utilities to sell the output (the capacity and energy) from those assets and activities after that date. Subsection 4 requires the Commission to conduct a rulemaking to govern the sale of that output, and this Notice of Rulemaking proposes that rule. The rulemaking is designated by section 3204 as a "major substantive rulemaking."<sup>1</sup>

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<sup>1</sup>Major substantive rulemakings are subject to provisions requiring submission and review by the Legislature. 5 M.R.S.A. §§ 8071-72.

Subsection 3 of section 3204 allows the Commission to extend the statutory deadline of March 1, 2000 for generation assets and generation-related business activities that are subject to the divestiture requirement of section 3204(1). It requires the Commission to conduct an additional rulemaking implementing that subsection. The rulemaking required by subsection 3 is also a major substantive rulemaking.

Although the two rulemakings required by subsections 3 and 4 of section 3204 are separate, they are related because it is necessary to determine what a utility must do with the output of any generation assets that subsection 1 requires the utility to divest by March 1, 2000 if the Commission, pursuant to subsection 3, grants an extension to that deadline. While the legislation is not explicit, for the reasons discussed in section III(A) below, we conclude that subsection 4 requires utilities to sell the capacity and energy from any assets that the Commission exempts from the March 1, 2000 divestiture deadline, just as those utilities must sell the capacity and energy from those assets (listed in subsection 1) that the Legislature has exempted from the March 1, 2000 divestiture deadline.

Proposed sections 1 through 9 of this Chapter address the sale of capacity and energy from all generation assets that do not have to be divested by March 1, 2000, whether the Legislature has exempted them from that deadline under section 3204(1), or the Commission has granted an extension to the deadline under subsection 3.

Proposed section 10 would implement the divestiture deadline extension provision of section 3204(3); it sets forth the procedure and substantive provisions for the granting of those exemptions.

### **III. PRIOR INQUIRY; GENERAL CONSIDERATIONS**

Prior to commencing this rulemaking, the Commission conducted an Inquiry. *Public Utilities Commission, Inquiry on Procedures and Standards for the Sale of Rights to Energy and Capacity and the Granting of Extensions for Generation Asset Divestiture*, Docket No. 98-227. See Commission Rules, ch. 110, §§ 1201-1206. The Inquiry requested commenters to address several policy questions. Central Maine Power Company (CMP), Bangor Hydro-electric Company (BHE), Maine Public Service Company (MPS) and the Independent Energy Producers of Maine (IEPM) responded to those questions.

One of the most important questions in the Notice of Inquiry asked the extent to which the Commission should be "prescriptive"

in setting forth the procedures and other requirements for the sale of capacity and energy pursuant to section 3204(4). CMP's responses argued that certainty is desirable and that the process should be established in advance of bidding and sales. CMP argued further that formulation of the methodologies for bidding and sale of the assets in advance will make the selection process more objective, faster and less subject to controversy.

BHE apparently agreed with CMP, suggesting that the rule should be structured to minimize "prudence review of transactions after the fact," either by establishing "comprehensive procedures" in the rule or by advance approval of each utility's plan. MPS disagreed, stating that the rule should "simply establish administrative procedures and not attempt to structure the process," that doing so "runs the risk of not anticipating the particularities of any individual sale." The IEPM suggested that the rule should only establish deadlines and that utilities should be given flexibility to design their own bid processes.

Although supporting a "prescriptive" procedure, CMP also stated that the rule should not preclude "other sale options that may present greater value to utilities and their ratepayers."

We agree with CMP that the rule should establish in detail the contents of the utilities' requests for bids and the methodology for evaluating bids. Establishing these processes in advance provides greater certainty both for utilities and bidders. We also agree that the approach may limit flexibility. Utilities and bidders both have an opportunity in this rulemaking, however, to influence the processes that will be used. In addition, because some provisions we adopt may be unnecessary for some utilities, e.g., because they have relatively few assets, a utility may request an exemption from any requirements pursuant to the waiver provision in proposed section 11. Finally, if a more advantageous sales opportunity presents itself outside the processes established by this rule, a utility may also request a waiver to take advantage of that opportunity.

While we want to establish certainty and advance notice of the processes, we also have proposed provisions that we believe are relatively simple and will not be burdensome to administer. As in the case of bids to provide standard offer service, we particularly desire that the methodology for evaluating bids be as simple and objective as possible.

We explain below the individual proposed sections of the rule.

#### IV. DISCUSSION OF SECTIONS OF PROPOSED RULE

##### A. Section 2 - Applicability of Chapter

##### 1. Subsection A - Utilities Subject to this Chapter

Proposed subsection 2(A) states that this Chapter will apply only to investor-owned electric utilities and transmission and distribution utilities. The statute that this Chapter implements, 35-A M.R.S.A. § 3204, applies only to investor-owned utilities and not to consumer-owned electric and transmission and distribution utilities as defined in 35-A M.R.S.A. §§ 3501(1) and 3501(6) respectively.

##### 2. Subsection B - Capacity and Energy Subject to this Chapter

Proposed section 2(B) describes the capacity and energy that must be sold pursuant to 35-A M.R.S.A. § 3204(4) and sections 2-9 of this Chapter. Section 3204(4) states that the rule adopted by the Commission shall require utilities to sell the "rights to capacity and energy from all generation assets and generation-related business activities, including purchased power contracts, that are not divested pursuant to subsection 1. . . ." Subsection 1 of section 3204 (paragraphs A-D) lists the group of assets and generation-related business activities that are not subject to the general requirement of divestiture by March 1, 2000.

It would appear to follow that proposed section 2(B) of this Chapter should incorporate the list of excepted generation assets and generation-related business activities from subsection 1 of the statute. We do not, however, include paragraph D from the subsection 1 list (assets that the Commission determines are necessary for the utility to perform its obligations as a transmission and distribution utility) because subsection 4 of section 3204 states specifically that the output from that excepted category of assets is not subject to the sale of capacity and energy requirement.

In addition to the output from the three categories incorporated from subsection 1, paragraphs A-C, of section 3204, we propose that section 2(B) of the rule include one other category. As discussed above, subsection 3 of section 3204 (and proposed section 10 of this Chapter) allows the Commission to extend the divestiture deadline of March 1, 2000 for any asset or generation-related business activity that subsection 1 otherwise requires the utility to divest, if the

Commission "finds that an extension would be likely to improve the sale value of those assets on the market."

Subsection 4 of section 3204 does not specifically mention the output from assets whose divestiture date has been extended by the Commission pursuant to subsection 3. Nevertheless, it does state that investor-owned utilities must sell the output from all generation assets and generation-related business activities "*that are not divested pursuant to subsection 1*" (emphasis added). If an asset is not divested because the Commission has extended the subsection 1 deadline for divestiture, then it literally is "not divested pursuant to subsection 1." It also is most unlikely that the Legislature intended different policies for similar circumstances: that a utility would have to sell the output from the assets the Legislature exempted (under subsection 1) from the divestiture requirement, yet it would not need to sell the output when the Commission (pursuant to subsection 3) grants an exemption from the subsection 1 deadline. Finally, the fact that a transmission and distribution utility cannot itself sell the output to retail customers provides further support for our conclusion that utilities must sell the output from assets whose divestiture deadlines have been extended by the Commission pursuant to subsection 3.<sup>2</sup>

B. Section 3 - General Requirement for Sale of Capacity and Energy

Section 3 is self-explanatory.

C. Section 4 - Conditions Applicable to Sales and Utility Renegotiations During Sale Periods

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<sup>2</sup>Section 3204(3) states that if the Commission grants an extension from the divestiture deadline of subsection 1, "the utility shall transfer to a distinct corporate entity by March 1, 2000 the generation assets to which the extension applies." As discussed below, we have included this requirement in proposed section 10(B) because it is required by the statute. As a matter of policy, we do not believe the requirement is necessary because the transmission and distribution utilities cannot sell the output from such assets to retail customers in any event, and they must sell it pursuant to 35-A M.R.S.A. § 3204(4), as we interpret that subsection. In addition, no similar requirement applies to assets that are exempt from the divestiture requirement under subsection 1 itself. We therefore currently intend to propose to the Legislature that it repeal the "distinct corporate entity" requirement.

1. Section 4(A) - Renegotiations by Utilities of  
Contracts for Capacity and Energy

Proposed section 4(A) states that utilities have a continuing right to renegotiate any contract or other entitlement under which it obtains capacity and energy, for the purpose of meeting its obligation to minimize stranded costs.

To meet their statutory obligation to provide just and reasonable rates (35-A M.R.S.A. § 301), all utilities must make all reasonable efforts to minimize costs. Under the Act, electric utilities (after March 1, 2000, transmission and distribution utilities) must mitigate stranded costs. 35-A M.R.S.A. § 3208(4). Maine's investor-owned utilities on numerous occasions have renegotiated high-priced contracts with qualifying facilities. Subsection 4 of section 3204 states that nothing in the subsection "prohibits a utility from renegotiating, buying out or buying down a contract with a qualifying facility in accordance with applicable laws." We wish to encourage utilities to continue their efforts at renegotiating QF contracts.

In its Inquiry comments, CMP recognized its obligation to mitigate stranded costs, and stated that the rule should accommodate renegotiations, buy outs and buy downs. CMP also stated, however, that "once a winning bidder has been selected for a particular asset and for a particular duration, that sale should continue in effect for its full term." CMP did not state a reason for its view.

There are countervailing considerations regarding either policy: if a renegotiation, buy down or buy out of a contract occurs during the period of a capacity and energy sale, but cannot become effective until the end of that period, stranded costs may not be directly mitigated to the maximum extent possible. On the other hand, if a contract between a utility and a QF may be terminated or renegotiated in the middle of a sale period under this Chapter, bidders may take that risk into account in their bid prices, with the possible result that the amount utilities receive for the energy and capacity will be lower and the offset to stranded costs will be smaller.

It is not possible to evaluate either of these considerations with full confidence. We have experience with successful renegotiations by Maine's electric utilities. We have little basis for determining the risk discount that bidders will apply to bids to account for the possibility that contracts will be renegotiated, but are concerned that any discount will reflect not only the risk that renegotiations may occur, but uncertainty about that risk as well.

We have proposed in section 4(A) that no renegotiated contract can become effective until the current sale period has ended unless both the level and the fuel source the output is unchanged or the purchaser consents.

We seek comment both about this proposal and the alternative approach that would state that all purchases of energy and capacity are subject to the risk that contracts between utilities and qualifying facilities might be renegotiated and that output might be reduced and/or fuel source altered. If we choose the latter approach, we would almost certainly consider requiring some period of notice prior to a renegotiated contract becoming effective that would change the amount or type of output. We request comment on the appropriate amount of such notice.

We request commenters to offer their considered opinions as to which approach is likely to achieve a greater reduction in stranded costs.

Finally, we seek comment on whether it would be feasible to require two sets of bids from all bidders based on the two approaches to the risk of renegotiated contracts described above and how, under such an approach, bids could objectively be compared.

## 2. Section 4(B) - Subsequent Divestiture by Utilities

Proposed subsection B addresses an issue that is similar to that addressed by subsection A. As discussed above, 35-A M.R.S.A. § 3204(1) requires investor-owned electric utilities, by March 1, 2000, to divest all assets and generation-related business activities other than those specifically listed as exempt in that subsection. 35-A M.R.S.A. § 3204(3), however, allows the Commission to extend that March 1, 2000 divestiture deadline. In our discussion of proposed section 2(B) above, we concluded that if such an extension is granted, the output from the generation asset or generation-related business activity must nevertheless be sold pursuant to the requirements of subsection 3 and proposed sections 4-9 of this Chapter. Under proposed section 10, the Commission will establish the length of the extension and will specify whether the utility must divest the asset or generation-related business activities on that specified date or whether it may do so on or before that date.

Proposed section 4(B) states that if the Commission grants an extension from the divestiture deadline in

subsection 1, the sale of the output from the excepted asset is subject to the obligation of the utility to divest the asset at or within the time specified in the Commission's order granting the extension. As a result, the sale necessarily is subject to the risk that the output from an excepted asset may not be available when the asset is divested. As discussed below, the Commission under section 10 can fashion an order granting a divestiture date extension so as to minimize the risk to a purchaser of the output.

Proposed section 4(B) also states that purchasers make the purchase subject to the risk that the capacity and energy from the asset or generation-related business activity may not be available after the divestiture. Bidders may discount the value of the output from an asset that is subject to a divestiture deadline because the amount of time the output is available is short or uncertain or both. Bidders might apply a greater discount to output that may be available only for a short period, even if the length of that period is certain. The discount might be greater still if the asset can be sold at any time prior to the deadline established by the Commission, rather than only at a specified time. On the other hand, utilities may be better able to maximize the value if they are permitted to divest the asset at any time prior to the deadline rather than only on the date specified by the Commission. In fashioning a request for an extension, we expect that the utility will take these considerations into account, as will the Commission in determining both the extension date and whether a utility must make the divestiture effective on the specified date or may divest at any time on or before the specified date. The Commission may, if otherwise appropriate, order a divestiture date that is the same as the end of a sale period for capacity and energy under this Chapter.

3. Section 4(C) - Risk of Non-Performance; Damages

Proposed section 4(C) states that a purchaser will assume the risk of non-performance by the actual producer of the power. Under this rule, a purchase is made from the utility rather than from the actual power producer. Nevertheless, under our proposal, purchasers would take on a risk that is similar to risks that wholesale purchasers incur in the competitive wholesale electricity market when they make direct purchases. A "generation asset or generation-related business activity" has value primarily because of its electrical output, and it is the output that a utility is selling to a purchaser. It is reasonable that the purchaser of the valuable output, not the utility and its ratepayers, should assume the risk of non-performance by the power producer. Because the purchaser



assumes the risk, it also should be entitled to any damages that might be due for non-performance by the producer. Thus, the standard form contract required by section 6(B) shall assign these risks and rights to the purchaser. In some cases liquidated damages may be available. Bidders will have notice of such provisions because proposed section 6(B)(1)(b) requires utilities to make all contracts available to bidders. If the power producer is the utility itself (e.g., because an asset is exempt from the divestiture requirement under subsection 1 or because the Commission has granted an extension under subsection 3), the utility would be liable for damages to the purchaser.

D. Section 5 - Dates for Issuance of Requests for Bids;  
Termination of Bidding Process

1. Section 5(A) - Initial Round

We have proposed August 2, 1999 as the proposed date on which utilities should issue requests for bids. We believe that date is reasonably far in advance of the March 1, 2000 deadline for the sale of output from non-divested assets, without being so far in advance of that deadline that potential bidders will have difficulty assessing its value.

Under Chapter 301 (Standard Offer), the Commission will issue its request for bids to potential suppliers of standard offer service on August 3, 1999 (120 days prior to date for selecting standard offer providers). See Chapter 301 §§ 8(A)(2) and 8(C)(1). There may be some identity between entities seeking to provide the standard offer and those seeking to purchase capacity and energy from non-divested utility generation assets. There may be some value to coordinating the two bid and selection processes.

It is not immediately apparent, however, whether the capacity and energy process should precede or be preceded by the standard offer process, or whether it is even feasible to have one process lag after the other given time constraints and the value of having neither process occur too far in advance of March 1, 2000. We solicit comments on this issue.

2. Section 5(B) - Subsequent Rounds

Proposed section 5(B) requires utilities to issue their requests for bids for the second sale of capacity and energy on August 1, 2001, two years after the initial request for bids, consistent with the fact that the initial sale period will be for two years.

We propose in this subsection that the Commission establish the length of subsequent purchase periods by order issued pursuant to the authority of this Chapter.

3. Section 5(C) - Additional Bidding

Proposed section 5(C) addresses the possibility that a purchaser of energy and capacity may default and that a utility may need to find a new purchaser. Under the proposal, the Commission may order a new round of bidding and may waive certain bidding requirements if necessary. The Commission must first, however, comply with the procedures and make the findings required by proposed section 8(B).

4. Section 5(D) - Termination of Bidding Process

Proposed section 5(D) states that when a utility's generation assets and generation-related business activities have been fully divested, no further bidding processes are necessary and the utility is no longer subject to this Chapter.

E. Section 6 - Requirements for Requests for Bids; Bidding and Sale

1. Section 6(A) - Asset Categories

In the Inquiry, CMP suggested that it may be advisable for the rule to allow bidders to bid separately for the output from various categories of generation assets. CMP suggested that renewable resources may have enhanced value because of the portfolio requirements of 35-A M.R.S.A. § 3210. CMP also stated that nuclear and Hydro Quebec Phase II entitlements have "unique characteristics." We agree that bidders should have the opportunity to bid separately for the output from separate categories of assets. The proposal requires requests for bids to list the following four categories:

- 1) QF contracts;
- 2) nuclear entitlements;
- 3) any other category proposed by the utility and approved by the Commission; and
- 4) all other generation sources

A bidder may provide separate bids for each (or all) categories, but cannot provide a single combined bid. We request comment on

whether the rule should specify different categories or subcategories.<sup>3</sup>

Proposed section 6(A) includes only 3 of the 4 categories proposed by CMP because Hydro Quebec Phase II does not appear to be included within any of the categories of assets that are listed as exempt from the divestiture requirement in 35-A M.R.S.A. § 3204(1). If a utility cannot divest a non-exempt asset by the March 1, 2000 deadline, it may request the Commission to extend the divestiture deadline under section 3204(3). Section 6(A) also allows a utility, through the approval process for requests for bids, to propose that requests for bids list additional output categories. A request for bids could list the output from an asset whose divestiture deadline is extended as a separate category, if approved by the Commission, or could include it in the "all other generation sources" category.

2. Section 6(B) - Contents of Requests for Bids;  
Commission Approval

Proposed section 6(B) governs the contents of the requests for bids that utilities will publish and send to potential bidders. Section 6(B)(1) states that the request for bids must state the bidding and pricing requirements contained in section 6(C). Section 6(B)(2) states the information that must be provided with the request for bids. The general goal of the provision is to provide potential bidders will all relevant contractual and operational information about generation sources whose output is for sale. We solicit comments on whether the list omits any important information or is over-inclusive.

Section 6(B)(2)(c) states that the request for bids shall separately state the peak and off-peak periods that the utility used for short-term energy rates in effect on January 1, 1997. For the reasons explained below, in our discussion of section 6(C), those time periods are used for bidders to provide peak and off-peak bids for qualifying facility (QF) and other renewable resource power.

Proposed section 6(B)(3) requires Commission approval of all requests for bids. That proposal is consistent with suggestions by CMP that the process be as certain as possible in advance of bidding, and that the Commission approve each utility's request for bids and proposed standard contract. Approval and disapproval of requests for bids is delegated to the

<sup>3</sup>For example, some providers may be interested in offering an "all hydro" product and might be willing to pay a premium for the output from hydro facilities.

Director of Technical Analysis. We seek comment on whether we should require bids to be based on the time differentiation in effect on January 1, 1997, whether we should adopt some other time differentiation (or none at all), and whether we should modify Chapter 360 in some manner.

3. Section 6(C) - Bid Pricing

a. Section 6(C)(1) - Separate Categories

Proposed paragraph 1 of subsection C requires separate bids for each of the categories listed in the request for bids and separate prices for each month in the sale period.

b. Section 6(C)(2) - Qualifying Facilities and Other Renewable Resources

Paragraph 2 of proposed subsection C governs bids for capacity and energy from qualifying facilities (QFs) and other renewable resources. It requires separate prices for capacity and energy (both in kilowatt hours) and for peak and off-peak periods. It is necessary to require this level of detail because, after March 1, 2000, the bid prices for QF output under this Chapter will establish the rates utilities must pay for QF power under Chapter 360 (Cogeneration and Small Power Production). Section 4(C) of Chapter 360 requires two sets of rates for QF power: short term energy rates (§ 4(C)(2)) and standard rates for capacity and energy (§ 4(C)(3)). Both must be established "pursuant to the sales prices" for QF output that are obtained "pursuant to 35-A M.R.S.A. § 3204(4)" and, therefore, this Chapter. The Chapter 360 provisions were based on our policy decision in that Chapter that the rates for purchases of QF power by utilities should be based on market prices, and that market prices were best determined by the sales prices for capacity and energy that would take place pursuant to 35-A M.R.S.A. § 3204(4) and this Chapter.

Chapter 360, § 4(C)(2) requires that short-term energy rates be "expressed on a cents-per-kilowatt hour basis;" both the short-term rates and the standard rates for capacity and energy (ch. 360, § 4(C)(3)) must be "time-differentiated." We propose to incorporate all of the Chapter 360 requirements into the bid pricing requirements of this Chapter so that the winning bid prices may serve as the rates required by Chapter 360.

The proposal requires bid-price time-differentiation to use the same peak and off-peak time periods that the utility used for the short-term energy rates

that were in effect on January 1, 1997. This requirement is derived from statute: section 7 of the Restructuring Act<sup>4</sup> requires that Chapter 360 use the time-of-day period in effect on that date in establishing the short-term energy QF rates under Chapter 360. The statute does not require bid prices under this Chapter to use those particular time-of-day periods (or even that bids under this Chapter for QF capacity and energy include any time-differentiation). Nevertheless, because the bids under this Chapter will establish the rates for QF purchases, it makes sense to use the same time-of-day periods in this Chapter.

We note that the statute (Restructuring Act, P.L. 1997, ch. 316, § 7) requires that the January 1, 1997 peak and off-peak periods be used only for short-term energy rates. Although Chapter 360, § 4(C)(3) requires "time-differentiation" for the standard rates for capacity and energy, neither the statute nor Chapter 360 requires the use of any particular time periods for standard rate that time-differentiation.<sup>5</sup> We see no reason to apply time-of-day periods to bids for QF capacity that differ from those required for QF energy.

We also note that § 4(C)(2) of Chapter 360, which governs short-term energy rates, requires those rates to be expressed in cents per kilowatt hour. Section 4(C)(3) of Chapter 360, which governs standard rates for capacity and energy, has no such requirement. Our proposal requires bids for both capacity and energy to be for kilowatt hours. We understand that capacity purchases under most QF contracts is by kilowatt-hour and request comment whether we should require bids for the capacity component of QF power to be expressed in that manner.

We also request comment on whether there is any reason why incorporation of any of these requirements, including the particular time-of-day periods in effect on January 1, 1997, would be detrimental to the bidding process established by this Chapter and, in particular, whether they could cause lower bids. We stated in the Chapter 360 Order:

If our section 3204(4) rulemaking reveals  
that our decisions [in Chapter 360] are

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<sup>4</sup>Section 7 of the Act is "unallocated" language, i.e., it does not appear in Title 35-A or in any other title of the Maine Revised Statutes Annotated.

<sup>5</sup>It is likely, however, that rates for the "energy component" of standard rates for capacity and energy established under ch. 360, § 4(C)(3) will be identical to the short-term energy rates established under ch. 360, § 4(C)(2).

unworkable or might tend to reduce the value utilities might receive for QF power, we will immediately reopen [Chapter 360] and adopt alternative avoided cost methodologies.

Order Adopting Amended Rule, Docket No. 97-794 (March 10, 1998) at n. 14.

3. Section 6(C)(3) - Other Categories

Proposed section 6(C)(3) governs bid prices for the capacity and energy categories listed in section 6(A) other than QF and other renewable resource power. The pricing requirements for these categories are much simpler. We request comment on whether, as proposed, we should permit separate prices for capacity and for energy and, if so, whether we should specify that the prices for capacity should be in kilowatts per month, in kilowatt hours or, as proposed, either.

4. Section 6(C)(4) - Bid Increments for Qualifying Facilities and Other Renewable Resources

Proposed section 6(C)(4) would permit bids in increments of 20% of the total output, or any multiple of 20%, for the qualifying facilities and renewable resources category output described in section 6(A)(1). The QF-renewable category is the largest category of output that must be sold pursuant to this Chapter; allowing bids for portions of that output may allow smaller bidders to participate in the bid process. The other proposed capacity and energy categories listed in section 6(A) (nuclear, specially approved and all other) are much smaller.

While a bidder may bid as small an increment as 20%, if the bidder bids any higher increment, it must also provide bids for each lower 20% increment. Requiring bids for all increments allows the Commission, if necessary, to require a utility to sell its qualifying facility output to multiple providers if we make a finding that unacceptable market concentration might otherwise occur. See discussion below under section 7(E). It is possible that not all increment levels will be equally attractive to a bidder. The proposal allows bidders to provide different prices for each increment.

F. Section 7 - Selection of Bidders; Sale

1. Section 7(A) - Eligible Bidders; Bidding Requirements; Time for Filing Bids; Noncompliance

Proposed section 7(A) states that bids must comply with all requirements stated in requests for bids (which are approved by the Commission) and that failure to comply with any material requirement results in disqualification. We request comment on the provision that allows Commission review of a utility's decision to disqualify a bid. In its comments in the Inquiry, CMP suggested that we make clear that "affiliated competitive providers" (as defined in 35-A M.R.S.A. § 3205(1)(A)) of large investor-owned utilities are permitted to bid for the output subject to this Chapter. Subsection A states that understanding. We are not aware of any restrictions on purchases of this output by affiliated competitive providers, but commenters may provide information on this issue.

2. Section 7(B) - Requirements Applicable to Utilities and Affiliated Competitive Providers

Proposed subsection B states that both utilities and their affiliated competitive providers are subject to the standards of conduct contained in 35-A M.R.S.A. § 3205(3) and that the Commission will establish in proposed Chapter 304.

3. Section 7(C) - Financial Qualifications of Bidders

Proposed subsection C states in very general terms that utilities shall determine whether winning bidders are financially qualified to make the required payments for the capacity and energy they will purchase. We do not propose that utilities must establish in advance that all bidders are qualified, as such a requirement would require substantially more effort by utilities. We also state no particular criteria for determining whether the winning bidder(s) is financially qualified. Utilities have had substantial experience buying and selling power and determining the ability of buyers and sellers to pay.

We request comments on whether the proposed provision would grant too much discretion to utilities and whether there may be reasons to require utilities to determine the financial capability of all bidders prior to the selection, and the provision allowing Commission review.

4. Section 7(D) - Selection

Proposed section 7(D) states that a utility will make its selection of the winning bidder(s) by December 1, 1999, i.e., three months prior to the effective date of the sales. For subsequent rounds of bids, utilities shall also make their

selection three months prior to the effective date of the sales. CMP suggested the selection date of December 1, 1999 in its Inquiry comments. That date should provide adequate time for completion of the sale and for purchasers to plan for the commencement of Maine's competitive market, which will also occur on March 1, 2000. The proposed date also allows sufficient time (between August 1, 1999 and December 1, 1999) for utilities to determine the winning bidder(s), whether the winning bidder(s) is financially qualified, and to select another winning bid if the initial winning bidder(s) is not financially qualified. December 1, 1999 is also the date on which the Commission will determine winning bidder(s) for standard offer service.

To determine the winning bid(s), the utility must compare bids that are likely to contain different prices from month to month and by time of day. We propose that utilities use the present value of the monthly prices in each bid, using as the discount rate the utility's before-tax cost of capital (the amount that the utility must earn for a fair return and to pay the federal and state income taxes on that return).

To determine the present values of the rates proposed by each bid for different times of day during the month, utilities must multiply each bid price by the quantities in kilowatt hours the utility obtained for each pricing category during the same month of a recent test period. Section 6(B)(1)(d) requires that the request for bids provide that kilowatt hour sales information, and section 6(B)(1)(e) requires the request for bids to state the 12 months of output data the utility will use in the net present value calculation. We request comment about whether providing this notice adequately protects against any possibility that bidders could become winners or losers solely because of a change in the period output period used for the present value calculation.

We also request comment on whether the sale and the terms of any purchase contract must be approved by the Federal Energy Regulatory Commission (FERC). If so, is the three months between December 1, 1999 and March 1, 2000 a sufficient amount of time to obtain that approval? Parties may also comment on whether it would be possible or acceptable to obtain FERC approval after March 1, 2000.

5. Section 7(E) - Effective Date of Sales; Length of Sales Periods

Proposed section 7(E) proposes that the first sale period will be two years and that the Commission will establish



the length of subsequent sale periods by orders it will issue two months prior to the issuance of subsequent requests for bids. We propose an initial period of two years because a shorter period would provide little certainty for purchasers, and a longer period increases the risk of uncertainty of future market prices. We selected the same period for standard offer service (Chapter 301) for similar reasons. There may be some advantage for the initial periods for both standard offer and sale of capacity and energy to be the same, as standard offer providers might also be bidders for capacity and energy under this rule. We request comment on the proposed initial sale period of two years.

6. Section 7(F) - General Principles Applicable to Determination of Financial Qualifications and Selection of Highest Bidders

Proposed section 7(F) states a general standard of fairness and non-discrimination that utilities must follow, as well as the principle that utilities shall select winning bidders so as to maximize the sale price of the capacity and energy and minimize stranded costs.

7. Section 7(G) - Market Power

Proposed section 7(G) provides a process for determining whether a single bidder may purchase all of the renewable resource portion of the capacity and energy available under this Chapter. This provision states that if the Commission conducts a proceeding that addresses market power, and determines that an unacceptable level of concentration would occur if a single purchaser purchased all of the power, it may limit the percentage that a single purchaser may purchase under this rule. The provision also states that the Commission could limit the amount of QF output that specified entities could obtain, after making a finding in another proceeding those entities possessed an unacceptable level of market concentration. We request comment on both of these proposals.

Finally, we seek comment on an alternative to the draft proposal: that this Chapter will state a maximum percentage that a single bidder may purchase, and, if so, what that percentage should be and the basis for establishing that percentage. We note that the Commission and Attorney General are presently preparing a report to the Legislature that will address market power issues relevant to the renewable market. The Commission will provide an opportunity for public comment on a draft of that report. We request comment on whether the

Commission should use findings in that report as a basis for establishing a particular maximum percentage.

8. Section 7(H) - Submission of Information to Commission; Stranded Costs

Proposed section 7(H) requires each utility to file notice with the Commission of its selection of winning bidders and documentation of the method it used for that selection. It also requires them to provide notice of the date that a contract with the winning bidder has been completed. This provision does not require specific Commission approval, thus avoiding any FERC preemption issues. As discussed at section 7(I) below, we may inquire as to the reasonableness in conducting the process in determining recoverable stranded costs.

9. Section 7(I) - Stranded Costs

Proposed section 7(I) states the effect that the sales price of capacity and energy sold pursuant to this rule will have on determinations of stranded costs for utilities. In general, the sales price will be used in determining the utility's stranded costs for the generation assets and generation-related business activities whose output has been sold. The proposed provision states, however, that the Commission may conduct a proceeding to determine whether the utility acted prudently in the conduct of its bidding and selection process and may adjust stranded costs accordingly. The rule establishes detailed bidding procedures, and selection of the winning bidder(s) is largely a computational exercise. There is little opportunity for utility discretion as to those matters. Utilities must, however, make efforts to attract a large number of high-quality bidders, and they must exercise judgment under section 7(B) in determining that the winning bidder is financially qualified. We seek comment on whether potential prudence issues are as limited as they appear to be, as outlined above.

G. Section 8 - Payment by Purchasers; Default

1. Section 8(A) - Payment

Proposed section 8(A) requires purchasers to pay monthly, not later than 20 days after the close of the billing. The billing period will be established in the contract between the utility and the purchaser(s). We request comment on whether these provisions are reasonable to both utilities and purchasers.

2. Section 8(B) - Default

Proposed section 8(B) sets forth the procedure to be used in the event of material default by a purchaser, as well as the Commission's authority to order a new bidding process and to require the temporary disposition of capacity and energy in the regional wholesale bulk power markets. The provision establishes the standards the Commission must apply (e.g., "material" default) and the findings the Commission must make. We request comment on whether the standards and findings are appropriate and whether any additional ones should be required.

The proposal also contains a provision allowing the Commission to issue a temporary order, even without holding a hearing, if the Commission makes a preliminary finding that the default is material and that the default is causing "severe financial hardship" to the utility. We request comment on whether this provision is necessary and whether the proposed standards and findings are appropriate.

H. Section 9 - Exception to Bidding and Sale Requirements

Proposed section 9 restates the provision in 35-A M.R.S.A. § 3204(4) that if the Commission determines that output of generation-related business activities is necessary for the utility to perform its obligations as a transmission and distribution utility in an efficient manner, that output is not subject to the bidding and sale requirements of 35-A M.R.S.A. § 3204(4) and this Chapter.

I. Section 10 - Extension of Date for Utility to Divest Generation Assets

Proposed section 10 implements 35-A M.R.S.A. § 3204(3). That provision allows the Commission to grant an extension of the March 1, 2000 divestiture deadline in section 3204(1) for specified generation assets or generation-related business activities. As discussed in Section II of this Notice, that extension authority is separate from the capacity and energy sale requirement of section 3204(4), and the Legislature required an additional rulemaking for section 3204(3). However, as also discussed above at section 2(B), we have determined that the output from an asset whose divestiture date is extended must be sold pursuant to subsections 2-9 of this Chapter. We therefore have combined the two rulemakings in a single proposed Chapter.

1. Section 10(A) - Procedure; Order

Proposed section 10(A) contains the date by which a utility must request an extension of the divestiture deadline, the procedure for addressing the request and what must be included in the Commission's order, if it grants the extension. The order must specify the extension date and whether the utility must divest the asset only on that date or on any date prior to the stated date. As discussed in detail at section 4(B) above, purchasers of the output of an asset or generation-related business activities whose divestiture deadline has been extended make that purchase subject to the risk that the divestiture will occur and that the output may not be available following the divestiture. The Commission may be able to mitigate that risk (and therefore enhance the value of the output) by specifying that an asset may only be sold on a specific date. Such a restriction might also reduce the value of the asset in the divestiture market, however. Conversely, an order allowing the utility to divest on any date prior to the extended deadline might have the opposite effects.

2. Section 10(B) - Transfer to Affiliates on March 1, 2000

If the Commission grants an extension of the divestiture deadline of March 1, 2000 for a specified generation asset or generation-related business activity, 35-A M.R.S.A. § 3203(3) requires the utility to transfer the asset or generation-related business activity to a "distinct corporate entity." Proposed section 10(B) restates that requirement. As discussed above at section 2(B), we do not see a need or purpose for the requirement, and we presently plan to propose to the Legislature that it repeal it. We have found that the Legislature intended that utilities must sell the output from all assets and generation-related business activities that are not divested pursuant to 35-A M.R.S.A. § 3204(1), whether the exemption is granted by the Legislature itself (in subsection 1) or the deadline is extended by the Commission (pursuant to subsection 3). If the utility must sell the output under a bidding system, there is little risk of self-dealing or anti-competitive behavior. In addition, the Legislature did not require a transfer to a separate corporation of those assets that are exempted from the divestiture deadline in 35-A M.R.S.A. § 3204(1). The ownership of those assets and generation-related business activities remains with the utility, although their output must be sold pursuant to 35-A M.R.S.A. § 3204(4) and sections 2-9 of this rule.

3. Section 10(C) - Obligation to Sell Capacity and Energy

Proposed section 10(C) requires that utilities sell the output (capacity and energy) from a generation asset or generation-related business activity whose deadline for divestiture has been extended by the Commission pursuant to this section and 35-A M.R.S.A. § 3204(3). As discussed above at III.A, those sales are governed by proposed sections 2-9 of this Chapter.

J. Section 11 - Waiver

Proposed section 11 is the standard exemption or waiver provision that the Commission has included in most recent rules.

V. **COMMENT PERIOD**

This Rulemaking will be conducted according to the procedures set forth in 5 M.R.S.A. §§ 8051-8058. **Written comments** on the proposed rule may be filed with the Administrative Director no later than **December 11, 1998**. Please refer to the Docket Number of this proceedings Docket No. 98-824, when submitting comments.

VI. **HEARING**

This Rulemaking will be conducted according to the procedures set forth in 5 M.R.S.A. §§ 8051-8058. No public hearing on this matter is presently scheduled, but one will be held if requested by any five interested persons. Persons wishing to request a public hearing on this rule must notify the Administrative Director, Public Utilities Commission, 242 State Street, 18 State House Station, Augusta, Maine 04333-0018 (telephone: (207) 287-3831), or on before **November 25, 1998**.

Whether a hearing is requested and held or not, a **technical conference** will be held on **December 18, 1998 at 10:00 a.m.** at the Commission's offices, 242 State Street, Augusta, Maine 04333 for the purpose of discussing and asking questions about the comments that must be filed by December 11, 1998. Any person, whether that person filed a comment or not, may attend and participate in that conference.

Please notify the PUC if special accommodations are needed in order to make the technical conference (or a hearing, if one is held) accessible to you by calling 1-287-1396 or TTY 1-800-437-1220. Requests for reasonable accommodations must be received 48 hours before the scheduled event.

VII. **FISCAL AND ECONOMIC EFFECTS**

In accordance with 5 M.R.S.A. § 8057-A(1), the fiscal impact of the proposed rule is expected to be minimal. The Commission invites all interested parties to comment on the **fiscal** impact and all other implications of this proposed rule.

#### VIII. SERVICE

The Administrative Director shall send copies of this Order and the attached rule:

1. All electric utilities in the State;
2. All persons who have filed with the Commission within the past year a written request for Notice of Rulemaking;
3. All persons listed on the Commission's list of persons who wish to receive notice of all electric restructuring proceedings;
4. All persons listed on the service list or who filed comments in the *Inquiry, Public Utilities Commission, Inquiry into Procedures and Standards for the Sale of Rights to Energy and Capacity and the Granting of Extensions for Generation Asset Divestiture*, Docket No. 98-227;
5. The Secretary of State for publication in accordance with 5 M.R.S.A. § 8053(5); and
6. Executive Director of the Legislative Council, State House Station 115, Augusta, Maine 04333 (20 copies).

By law, the Commission must conclude this rulemaking proceeding and adopt a provisional rule by March 1, 1999.

Accordingly, it is

#### O R D E R E D

1. That the Administrative Director send copies of this Order and the attached proposed rule to all the persons listed

above and compile a service list of all such persons and any persons submitting written comments on the proposed Rule.

2. That the Administrative Director send a copy of the Order Commencing Rulemaking Proceeding to the Secretary of State for publication in accordance with 5 M.R.S.A. § 8053.

Dated at Augusta, Maine this 3rd day of November, 1998.

BY ORDER OF THE COMMISSION

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Dennis L. Keschl  
Administrative Director

COMMISSIONERS VOTING FOR:      Welch  
   Nugent  
   Diamond